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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff,
v.
GLENIO JESUA FERREIRA SILVA, Defendant.

) CR No. 07-678 JSW

) MEMORANDUM IN OPPOSITION TO
DEFENDANT SILVA'S MOTION TO
DISMISS THE INDICTMENT FOR
FAILURE TO ALLEGUE THE REQUISITE
SPECIFIC INTENT

) Hearing:
Date: August 21, 2008, 2:30 pm
Courtroom: Floor 2, Ctrm 2

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1 Defendant's motion seeks to dismiss an indictment that is constitutionally
 2 sufficient and on its terms, fully apprises the defendant of the nature and elements of the
 3 charge against him. The language of the indictment properly charges the mens rea
 4 required under the statute and that is recognized in well-established case law.
 5 Defendant's motion, in effect, seeks to have this Court ignore long standing case law, and
 6 require an indictment contain the level of specificity of a jury instruction. In addition, the
 7 defendant prematurely seeks to have this court make rulings on the sufficiency of the
 8 evidence and to order disclosure of the grand jury transcripts. This motion is not
 9 supported by law and should be dismissed in all respects.

10

11 I. BACKGROUND

12 On October 25, 2008, the Grand Jury for the Northern District of California
 13 returned an indictment charging the defendant Glenio Silva with Alien Harboring in
 14 violation of Title 8, United States Code, section 1324(a)(1)(A)(iii). *See ECF Docket No.*
 15 21. Section 1324(a)(1)(A)(iii) provides that

16 Any person who – . . . knowing or in reckless disregard of the
 17 fact that an alien has come to, entered, or remains in the
 18 United States in violation of law, conceals, harbors, or shields
 from detection, such alien in any place, including any building
 or by any means of transportation.

19 8 U.S.C. § 1324(a)(1)(A)(iii). The indictment specifically charged that

20 Beginning on a date unknown to the Grand Jury but not later
 21 than April 30, 2000, and continuing until on or about June 15,
 22 2007, in the Northern District of California, the defendant,
 23 GLENIO JESUA FERREIRA SILVA, did *knowingly and*
intentionally conceal, harbor, and shield from detection aliens,
 24 including John Doe #1; John Doe #2; John Doe #3; John Doe
 #4; John Doe #5; and John Doe #6 at 954 B Street, Hayward,
 California and 599 Monterey Street, San Francisco,
 California, in *knowing or reckless disregard* of the fact that
 25 the aliens had remained in the United States in violation of
 26 law, in violation of Title 8, United States Code, Section
 1324(a)(1)(A)(iii).

27 *Indictment, ECF Docket No. 21* (emphasis added). The defendant was arraigned on the

1 indictment on October 26, 2007. *See ECF Docket No. 23.* On May 1, 2008, the United
 2 States provided notice by letter of the identity of the aliens identified at John Doe #1
 3 through #6.¹

4 **II. ARGUMENT**

5 **A. The Government's Indictment, Which Mirrors The Statutory Language,
 6 Satisfies Constitutional Requirements.**

7 An indictment is required to be "a plain, concise, and definite written statement of
 8 the essential facts constituting the offense charged. . . ." Fed. R. Crim. P. 7(c)(1). The
 9 Supreme Court has articulated three constitutional requirements for an indictment: it must
 10 contain the elements of the offense charged, it must inform the defendant of the charge
 11 against which he/she must defend, and it must allow the defendant to plead an acquittal or
 12 conviction. *Hamling v. United States*, 418 U.S. 87, 117 (1974). *See also United States v.*
 13 *Resendiz-Ponce*, 549 U.S. 102, 127 S. Ct. 782, 788 (2007) (holding that a indictment
 14 charging a violation of 8 U.S.C. § 1326 which "pointed at" the statute and alleged a date
 15 was sufficient); *United States v. Lane*, 765 F.2d 1376, 1380-81 (9th Cir. 1985) (dismissing
 16 challenge to sufficiency of indictment and finding that although it lacked explicit
 17 allegations of the arrangement of the conspiracy, the language charging conspiracy to
 18 defraud and recitation of overt acts was sufficient to apprise the defendant of the facts
 19

20 ¹ The May 1, 2008 letter advised counsel of the identities of seven aliens that had been
 21 identified as harbored aliens before the grand jury and regarding whom counsel had previously
 22 been provided with full discovery. In the letter, undersigned counsel also advised defense
 23 counsel that she was aware that seven, not six as listed in the Indictment, had been identified
 24 before the Grand Jury and that she intended to seek a superseding indictment identifying the
 above seven aliens as well as three other aliens - who were identified by name in the letter - and
 regarding whom full discovery had already been provided.

25 Notwithstanding this detailed disclosure, the defendant claims that he does not know who
 26 the "John Does" are in the indictment. *Def. Motion*, p. 6, n. 5. Not only has the defendant been
 27 advised of the identities of the "John Does" referenced in the Indictment, he has also been
 28 advised of the identities and provided discovery regarding additional aliens for whom a
 superseding indictment will be sought.

1 underlying the charge). Generally, an indictment that tracks the language of the charged
 2 statute is sufficient. *Resendiz-Ponce*, 549 U.S. 102, 127 S. Ct. at 788 (the time and date
 3 restrictions in the indictment which tracked the statutory language provided the defendant
 4 “ample protection”); *United States v. Davis*, 336 F.3d 920, 922 (9th Cir. 2003) (indictment
 5 that tracked language of the statute held sufficient). *See also United States v. Bonallo*,
 6 858 F.2d 1427, 1430-31 (9th Cir. 1988).(upholding sufficiency of an indictment finding
 7 that “while the indictment here fell short of the desired standard, it was, nevertheless,
 8 sufficient to fairly inform [the defendant] of the charge against him).

9 In this case, the indictment, which tracks the language of section 1324(a)(1)(A)(iii)
 10 nearly verbatim, identifies the charged statute, the elements of the offense charged, a
 11 mens rea element, the dates of the alleged offenses, and the locations where the offense is
 12 alleged to have occurred. In addition to tracking the language of the statute, the
 13 indictment is premised on a “knowing and intentionally” act by the defendant, a mens rea
 14 that is not included in the statute but requisite for culpability for this criminal act. This
 15 level of detail amply informs the defendant of the charge against which he must defend
 16 and permits to plead guilty or not guilty to the offense. *See Hamling v. United States*, 418
 17 U.S. at 117 (1974).

18 The defendant incorrectly contends that the indictment in this case suffers from
 19 the same “critical flaw” as the indictment in *United States v. Pernillos-Fuentes*. *See Def.*
Motion to Dismiss, p. 3 (ECF Docket No. 74). In that case, the indictment charged an
 21 attempt crime, attempted illegal reentry, and failed to contain *any* reference to intent. 252
 22 F.3d 1030, 1031-32 (9th Cir. 2001)(emphasis added). In *Pernillos-Fuentes*, the Ninth
 23 Circuit held that an indictment charging an attempt crime, in that case, attempted illegal
 24 reentry, was required to allege the specific intent. *Id.* at 1032. In this case, the Indictment
 25 does set forth a mens rea element in charging that the defendant “did *knowingly and*
 26 *intentionally . . .*” *See Indictment*, ECF Docket No. 21.

27 The defendant’s reliance on *United States v. Russell* is also misplaced. In *Russell*,
 28 the indictment was found to be insufficient. 369 U.S. 749, 765 (1962) (holding that

1 indictment charging persons for failure to testify before the House subcommittee on Un-
 2 American activities failed to identify the subject matter of refusal and was therefore
 3 insufficient). However, the charged statute in that case - 2 U.S.C. § 192, Failure to
 4 Testify or Give Papers Before Congress² - was one that by necessity required
 5 identification of specific facts, namely the subject matter on which the person failed to
 6 testify. *Id.* In its holding, the Court noted that “the very core of criminality under [that
 7 statute] is pertinency to the subject matter under inquiry of the questions which the
 8 defendant refused to answer.” *Id.* at 764-765; *see also Resendiz-Ponce*, 549 U.S. 102,
 9 127 S. Ct. At 789 (an indictment charging a violation of 18 U.S.C. § 1326 does not
 10 require the same level of specification as the statute in *Russell*).

11 An indictment charging Alien Harboring in violation of Title 18, United States
 12 Code, section 1324(a)(1)(A)(iii) does not require the same level of specificity as an
 13 indictment charging contempt for a specific act in violation of Title 2, United States
 14 Code, section 192. However, even if such specificity is required, the indictment against
 15 the defendant informs him of the specific dates and locations and elements of the offense
 16 charged and is therefore sufficient.

17 **B. The Indictment Against The Defendant Alleges The Correct Mens Rea
 18 Element.**

19 The defendant’s challenge that the indictment fails to properly allege mens rea
 20 fails in two respects. First, he flatly disregards the plain text of the indictment which
 21 includes a mens rea element. Second, he seeks to import a requirement that an indictment
 22 contain the level of detail explaining an element of an offense that would be proper for a
 23 jury instruction. His argument fails in both respects.

24 1. Defendant Alleges An Improper Mens Rea For This Crime

25 The United States does not dispute that the crime of Alien Harboring requires a

27 ² Every person who . . . having appeared [before Congress], refuses to answer any
 28 question pertinent to the question under inquiry, shall be deemed guilty . . . “ 18 U.S.C. § 192.

1 mens rea or level of scienter. The Indictment in this case charges that

2 the defendant, GLENIO JESUA FERREIRA SILVA, did
 3 *knowingly and intentionally* conceal, harbor, and shield from
 4 detection aliens . . . in *knowing or reckless disregard* of the
 5 fact that the aliens had remained in the United States in
 6 violation of law . . .

7 *Indictment, ECF Docket No. 21* (emphasis added). The Indictment clearly includes a
 8 mens rea element that the defendant “knowingly and intentionally” took acts concerning
 9 that aliens, the immigration status of whom he was “in knowing or reckless disregard.

10 Title 8, United States Code, section 1324(a)(1)(A)(iii) provides that

11 Any person who – . . . knowing or in reckless disregard of the
 12 fact that an alien has come to, entered, or remains in the
 13 United States in violation of law, conceals, harbors, or shields
 14 from detection, such alien in any place, including any building
 15 or by any means of transportation.

16 The statute does not refer to or infer a mens rea requiring a specific intent to violate the
 17 alien harboring provision of the immigration law. The “specific intent” mens rea urged
 18 by defendant is not the correct mens rea for this crime. The statute simply requires proof
 19 that an action was taken “in knowing or reckless disregard” of facts concerning an alien’s
 20 immigration statutes. Defendant does not, and cannot, support his argument that the
 21 crime of alien harboring requires specific intent.

22 In *United States v. Liparota*, the Supreme Court held that Congressional intent is
 23 the best guide to determine the mental state that is required to prove a violation of law.
 24 471 U.S. 419, 424 (1985). The Ninth Circuit, citing to *Liparota*, has also recognized that
 25 because federal crimes are created by statute, the court should first look to the statute to
 26 determine the mens rea associated with a particular crime. See *United States v. Nguyen*,
 27 73 F.3d 887, 890-91 (9th Cir. 1995). Thereafter, if any ambiguity exists regarding
 28 Congress’ intent, the court will imply a mens rea element. *Id.* at 891. In this case, the
 29 statute calls for “knowing or reckless disregard” as a mental state concerning the status of
 30 the illegal aliens. To the extent that the statute is considered to be silent on the mens rea
 31 regarding the defendant’s intent in the actions taken towards the aliens - i.e., concealment,
 32 harboring, or shielding from detection - if an intent is to be implied, a general intent, not a

1 specific intent is the appropriate mens rea.

2 The presumption regarding scienter is in favor of “proof of general intent - that is,
 3 that the defendant possessed knowledge with respect to the actus reus of the crime . . .”
 4 *United States v. Carter*, 530 U.S. 255, 269-69 (2000). “To act with general intent, a
 5 defendant must know the facts that make his actions illegal, but not that the action itself is
 6 illegal. That is, the defendant need only intend to perform the underlying prohibited
 7 action, not to break the law.” *United States v. Salazar-Gonzalez*, 458 F.3d 851, 855-56
 8 (9th Cir. 2006). See *United States v. Carter*, 530 U.S. at 269-69 (general intent means that
 9 “the defendant possessed knowledge with respect to the actus reus of the crime”). In
 10 contrast, to act with specific intent, a heightened level of mens rea, “means ‘more than the
 11 general intent to commit the act [but that] the defendant knowingly did an act which the
 12 law forbids, purposely intending to violate the law.’” *United States v. Celestine*, 510 F.2d
 13 457, 461 n.5 (9th Cir. 1975)(citation omitted).

14 In *United States v. Garcia*, the Ninth Circuit addressed the issue of the appropriate
 15 scienter element in the crime of transportation of illegal aliens in violation of Title 8,
 16 United States Code, section 1324(a)(1)(A)(ii). 400 F.3d 816, 819-20 (9th Cir. 2005).
 17 Because the statutory language for this offense is similar to the statutory language for
 18 alien harboring in the following subsection, *Garcia* provides useful guidance in assessing
 19 the appropriate scienter level.³ In *Garcia*, the Court held that transportation of illegal
 20

21 ³ Section 1324(a)(1)(A)(ii) - Transportation of Illegal Aliens - states that
 22 Any person who – . . . knowing or in reckless disregard of the fact
 23 that an alien has come to, entered, or remains in the United States
 24 in violation of law, transports, or moves or attempts to move such
 alien within the United States by means of transportation or
 otherwise, in furtherance of such violation of law. . . .”

25 Section 1324(a)(1)(A)(iii) - Harboring of Illegal Aliens - states that:

26 Any person who – . . . knowing or in reckless disregard of the fact
 27 that an alien has come to, entered, or remains in the United States
 28 in violation of law, conceals, harbors, or shields from detection,
 such alien any any place, including any building or by any means
 of transportation.

1 aliens does not require specific intent but rather only that the defendant acted with
 2 “knowledge or in reckless disregard.” *Id.* at 819-20. *See also United States v. Uresti-*
 3 *Hernandez*, 968 F.2d 1042, 1046 (9th Cir. 1992)(upholding a “reckless disregard” jury
 4 instruction for Transportation of Illegal Aliens charge). The Second Circuit has held
 5 similarly with respect to the scienter element for transportation of illegal aliens. *United*
 6 *States v. Musaleen*, 35 F.3d 692, 698 (2d Cir. 1994). In *Musaleen*, the defendants’
 7 challenged their convictions on the ground that the “statute permits conviction without
 8 requiring actual knowledge in satisfaction of the mens rea element.” *Id.* The Second
 9 Circuit noted that many statutes, including transportation of illegal aliens, permit
 10 conviction on the basis of “reckless disregard” of certain facts or risks. *Id.*

11 While not directly addressing challenges to the level of mens rea required for
 12 conviction, in addressing the specific charge at issue in this case - alien harboring - and
 13 transportation of illegal aliens, three other circuits have recognized that a defendant may
 14 be convicted based on his “reckless disregard” of the alien’s unlawful presence. *United*
 15 *States v. Tiptoe*, 518 F.3d 591, 595 (8th Cir. 2008)(holding there was adequate basis for
 16 the jury to conclude that the defendants “knew or reckless disregarded the fact that the
 17 aliens were unlawfully in the country” to support alien harboring conviction); *United*
 18 *States v. Khanani*, 502 F.3d 1281, 1287-89 (11th Cir. 2007)(upholding alien harboring
 19 conviction following instructions that the defendant “knowing” acted and that he “knew
 20 or was in reckless disregard” of the alien’s status); *United States v. Zlatagur*, 271 F.3d
 21 1025, 1029-30 (11th Cir. 2001)(upholding a jury instruction that included “knew or
 22 reckless disregard” as a mens rea element” for transportation of illegal aliens); *United*
 23 *States v. Kim*, 193 F.3d 567, 574-75 (2nd Cir. 1999)(upholding alien harboring conviction
 24 on the ground that there was sufficient evidence to show that the defendants “knew or
 25 recklessly disregarded” status as an alien not authorized to work).

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1 The alien harboring statute defines the mental state of the criminal conduct as any
 2 person who “knowing or in reckless disregard of the fact that an alien” *See* 8 U.S.C.
 3 § 1324(a)(1)(A)(iii). This language does not intend for a specific intent requirement, as
 4 claimed by the defendant, but rather a general intent, including direct knowledge or
 5 recklessness. Defendant’s challenge is not supported by law and has been dismissed in a
 6 strikingly similar case. In *United States v. Calhela*, the defendant was charged with
 7 several offenses, including alien harboring in violation of Title 18, United States Code,
 8 section 1324(a)(1)(A)(iii). 456 F. Supp. 2d 350 (D. Conn. 2006). The government
 9 alleged that the defendant had hired illegal Portuguese aliens to work at his Dunkin’
 10 Donuts coffee stores in Connecticut. *Id.* at 355-56. The defendant filed a motion to
 11 dismiss claiming that the indictment failed to allege a mental state. *Id.* at 361. In
 12 *Calhela*, the indictment alleged that ““the defendants . . . knowing or in reckless
 13 disregard”” committed the offenses. *Id.* The *Calhela* court held that the indictment, by
 14 alleging that the defendant “knew or acted with reckless disregard,” alleged scienter
 15 under section 1324(a)(1)(A)(iii). *Id.*

16 In this case, the Indictment alleges that the defendant acted in “knowing or
 17 reckless disregard” of the alien’s immigration status but also that he took actions to
 18 harbor the aliens “knowingly and intentionally.” *See Indictment, ECF Docket No. 21.*
 19 This level of mens rea has appropriately and sufficiently been alleged in the statute.
 20 Accordingly, the defendant’s Motion to Dismiss should be dismissed.

21 2. The Detail of a Jury Instruction Is Not Required In An Indictment

22 Defendant improperly seeks to have this court ignore the long-standing case law
 23 that an indictment is a “plain, concise, and definite written statement of the essential facts
 24 constituting the offense charged” *see supra* Section II.A, and asks this Court to require
 25 the level of detail contained in a jury instruction in the indictment. In *United States v.*
 26 *Davis*, the defendant presented a similar challenge after conviction in asking the district
 27 court to dismiss the indictment for failure to allege any criminal intent. 336 F.3d 920, 922
 28 (9th Cir. 2003). In *Davis*, the indictment, which charged escape in violation of Title 18,

United States Code, section 751(a), did not contain any reference to an intent requirement but did track the language of the statute that the defendant did “escape[] or attempt[] to escape from ... any institution or facility.” *Id.* at 922-24. In affirming the conviction, the Ninth Circuit held that “[t]here is no dispute that the indictment does not contain a specific verbal elaboration of criminal intent. This, however, is not fatal to the indictment so long as the requisite intent is unambiguously found in the words of the indictment.” *Id.* at 924. Similarly, in *United States v. Fuller*, the defendant challenged the sufficiency of the indictment claiming that the indictment did not allege that “that document be or appear to be made by or under the authority of the United States.” CR No. 07-30114, 2008 WL 2651413, at *5 (9th Cir. July 8, 2008). Although the court recognized that phrase was an element of the offense that must be proved at trial, it nonetheless held that the indictment contained the elements of the offense, fully apprised the defendant, and was therefore sufficient. *Id.* “Though the indictment does not charge that the document ‘appeared to be made by or under the authority of the United States,’ a document ‘of the United States’ [which was charged] sufficiently connotes a document ‘made by or under the authority of the United States.’” *Id.* In this case, the Indictment sets forth a scienter or mens rea requirement. The lack of further explanation as to the detail that must be proven is more appropriately contained in a jury instruction and does not render the indictment constitutionally insufficient.

The defendant’s motion rests mainly on two cases in which the defendant was challenging the jury instructions or sufficiency of the evidence supporting a conviction, not the sufficiency of the indictment. See cases cited in *Def. Motion*, pp. 3-5, ECF Docket No. 74.⁴ From these cases, he argues that the indictment should contain language

⁴ In support of this argument, the defendant cites to the following cases: *United States v. You*, 382 F.3d 958 (9th Cir. 2004)(affirming conviction for alien harboring over challenge to the mens rea set forth in the jury instruction); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1023-24 (9th Cir. 2000)(on a challenge to the sufficiency of the evidence in a transportation of illegal aliens under section 1324(a)(1)(A)(ii), court affirmed the conviction and held that the government was required to prove that the defendant had an intent to further the presence of the

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1 stating that the defendant acted with the specific criminal intent to “purposely avoid
 2 immigration detection.” *See Def. Motion, pp. 4, ECF Docket No. 74.* Although these
 3 cases may be instructive to drafting accurate jury instructions, none are instructive in
 4 assessing the sufficiency of the indictment. A decision by this Court regarding specific
 5 type of knowledge required under the charged statute is premature now and is more
 6 properly left to a pretrial conference when the court will consider the jury instructions
 7 proposed by each of the parties.

8 3. The Ninth Circuit Does Not Require Proof Of Intent to Evade Immigration
Authorities As An Element of Alien Harboring

9
 10 Although not pertinent to assessing the sufficiency of the indictment, to fully
 11 respond to the defendant’s Motion and advise this Court of the pertinent case law
 12 concerning the element of the charged offense, the United States now summarily
 13 addresses the defendant’s claim that the crime of alien harboring requires an intent to
 14 evade immigration authorities.⁵ In the Ninth Circuit, the elements of alien harboring have
 15 been muddled by recent case law interpreting Title 8, United States Code, section 1324.
 16 In contrast to other sub-sections of Section 1324, by its terms, Section 1324(a)(1)(A)(iii)
 17 does not require proof that the defendant acted in furtherance of the alien’s continued
 18 presence in the United States or to avoid detection. *Compare* 8 U.S.C. §
 19 1324(a)(1)(A)(ii) and 8 U.S.C. § 1324(a)(1)(A)(iii) (both statutes set forth in n.3).

20

21

22 alien); *United States v. Hernandez-Franco*, 189 F.3d 1151 (9th Cir. 1999)(on a motion
 23 challenging the sufficiency of the evidence of transportation of illegal aliens, court upheld the
 24 conviction finding that knowledge of illegal presence and intent to further presence in the United
 25 States can be proven by direct or circumstantial evidence); *United States v. Nguyen*, 73 F.3d 887
 26 (9th Cir. 1995) (reversing conviction for bringing in of illegal alien for failure to include intent in
 27 jury instruction and prove intent).

28

⁵ The United States reserves the right to more fully address this issue upon submission of
 27 jury instructions prior to trial and future proceedings before this court concerning jury
 28 instructions.

1 Historically, the Ninth Circuit has held that in proving a violation of alien
 2 harboring under Title 8, United States Code, Section 1324(a)(1)(A)(iii), the United States
 3 was not required to prove that the defendant acted in furtherance of continuing the alien's
 4 illegal presence or that the defendant acted with an intent to avoid detection of the alien.
 5 In *United States v. Aguilar*, the Court held that a charge of "harboring" did not require
 6 proof of an intent to avoid detection. 883 F.2d 662, 690 (9th Cir. 1989)(relying on
 7 legislative history in finding that "the word 'harbor' means 'to afford shelter to' and does
 8 not require an intent to avoid detection") (citing *United States v. Acosta de Evans*, 531
 9 F.2d 428 (9th Cir. 1976), superseded on other grounds, *United States. v. Gonzalez-Torres*,
 10 273 F.3d 1181 (9th Cir. 2001). See also *United States v. Quinones*, 883 F.2d 662, 689-90
 11 (9th Cir. 1989) (without ruling on sufficiency of jury instruction, affirming conviction
 12 based on alien harboring instruction that required proof that the defendant's conduct
 13 "substantially facilitated the alien's unlawful presence" and did not contain a requirement
 14 that the defendant act with "intent to evade detection"). Although *United States v.*
 15 *Aguilar* has not been overruled on the issue of alien harboring, the Ninth Circuit's later
 16 decisions on jury instructions for the "bringing in" and "transportation" offenses charged
 17 under section 1324 have confused the elements of proof for this seemingly
 18 straightforward offense.

19 In cases addressing different sub-sections of Section 1324, namely the "bringing
 20 in" or "transportation" of illegal aliens under sections 1324(a)(1)(A)(I) and
 21 1324(a)(1)(A)(ii), the Ninth Circuit has required proof of an intent to further the alien's
 22 illegal presence or to avoid detection of the alien. In *United States v. Barajas-Montiel*,
 23 the Court considered a jury instruction for bringing in of illegal aliens in violation of
 24 Section 1324(a)(1)(A)(I).⁶ The Court held that although Section 1324(a)(1)(A)(I) did not

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 26 ⁶ Section 1324(a)(1)(A)(i) provides any person who "knowing that a person is an alien,
 27 brings to or attempts to bring to the United States in any manner whatsoever such person at a
 28 place other than a designated port of entry or place other than as designated by the
 Commissioner, regardless of whether such alien has received prior official authorization to come
 to, enter, or reside in the United States and regardless of any future official action which may be
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1 explicitly include language that the defendant act with an intent to commit a crime, the
 2 United States is required to prove an intent to commit a crime as an element of the
 3 offense. 185 F.3d 947, 953 n.7 (9th Cir. 1999). The Court held that the act of bringing in
 4 an illegal alien was similar to transporting aliens which was addressed in Section
 5 1324(a)(1)(A)(ii) and does, in its terms, include a requirement that the defendant act with
 6 an intent to violate the law. *Id.*; see also *United States v. Hernandez-Guardado*, 228 F.3d
 7 1017, 1022 (9th Cir. 2000) (holding that Section 1324(a)(1)(A)(ii) (transporting aliens)
 8 requires more than just knowledge or reckless disregard for the alien's illegal status and
 9 that the Government must prove that the defendant "intended to further the alien's illegal
 10 presence in the United States"); *United States v. Nguyen*, 73 F.3d 887, 894 (9th Cir. 1995)
 11 (holding Section 1324(a)(1)(A)(ii) requires proof on intent to criminal act).

12 In *United States v. You*, an alien harboring case under Section 1324(a)(1)(A)(iii),
 13 the government proffered and the court adopted jury instructions that included a
 14 requirement that the defendants acted with 'the purpose of avoiding [the alien's] detection
 15 by immigration authorities.' 382 F.3d 958, 965-66 (9th Cir. 2004). The defendant
 16 challenged the jury instruction claiming that the instruction did not include the word
 17 "knowingly" in the instructions and therefore did not require the jury to find the requisite
 18 mens rea for the crime. *Id.* Notwithstanding the absence of any language in the terms of
 19 the statute that the defendant acted "for the purpose of avoiding [the alien's] detection by
 20 immigration authorities," the Court upheld an alien harboring jury instruction that
 21 included a requirement with that language. The court held that although the instructions
 22 did not include the word "knowingly," the language did include a mens rea element
 23 because the jury must find that the defendants acted with "the purpose of avoiding [the
 24 aliens'] detection by immigration authorities." *Id.* (citations and quotations omitted).

25 Although proffered and adopted in *You*, the United States does not concede in this
 26 case, that the jury instructions for alien harboring should properly include a requirement

27
 28 taken with respect to such alien... shall be punished."

1 that the defendant acted with “the purpose of avoiding [the alien’s] detection by
 2 immigration authorities. The United States suggests that because the *You* case merely
 3 involved a challenge to the mens rea aspect of the jury instruction, it did not address
 4 whether such language was properly included in the language of the jury instructions
 5 proffered by the United States and is therefore not binding authority on the elements of a
 6 the jury instruction for a violation of Title 8, United States Code, section
 7 1324(a)(1)(A)(iii). The *You* Court was not addressing whether this element was required
 8 to prove alien harboring but was simply ruling that the United States had, by inclusion of
 9 this language, met its burden with respect to knowledge. Regardless of how the Court
 10 interprets these cases, this issue is more properly heard prior to trial when the parties
 11 submit proposed jury instructions.

12 For all these reasons, the indictment as charged sufficiently sets forth an intent
 13 requirement and the defendant’s Motion should be denied.

14 **C. Defendant’s Untimely Challenge To The Sufficiency Of the Evidence Should
 15 Be Denied.**

16 The defendant’s challenge to the sufficiency of the evidence is premature. In
 17 effect, he asks this Court to enter an order for summary judgment based on his recitation
 18 of and faulty interpretation of a small portion of the evidence to be presented at trial. It is
 19 well established that “[a] motion to dismiss the indictment cannot be used as a device for
 20 a summary trial of the evidence . . .” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir.
 21 2002) (denying motion to dismiss for failure to state an offense). *See also United States
 22 v. Jensen*, 93 F.3d 667, 669 (1996) (“[a] defendant may not properly challenge an
 23 indictment, sufficient on its face, on the ground that the allegations are not supported by
 24 adequate evidence) (citation and quotation omitted); *United States v. Calhela*, 456 F.
 25 Supp. 2d 350, 361 (D. Conn. 2006) (alien harboring case in which the court denied a
 26 motion to dismiss based on the sufficiency of the indictment holding that “[w]hether the
 27 Government will be able to prove its allegations at trial that defendants were aware of, or
 28 acted in reckless disregard of, the unlawfulness of the alien’s entry and presence . . . is not

1 properly considered at this stage"). The Defendant's unsupported suggestion to restrict
 2 evidence regarding certain witnesses is no more than a challenge to the sufficiency of the
 3 evidence and should be denied.

4 **D. Defendant's Request for An Order Compelling Grand Jury Transcripts
 Should Be Denied.**

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 6 Defendant's request for Grand Jury transcripts is not supported by law and should
 7 be denied. His unfounded and conclusory speculation whether the Grand Jury was
 8 improperly instructed does not warrant this Court ordering disclosure of transcripts that
 9 are not subject to discovery under Fed. R. Crim. P. 16 or to trial disclosure at this time.

10 *See Fed. R. Crim. P. 16(a)(3); 18 U.S.C. § 3500; Guidelines for Motions, Final Pretrial
 Conference and Trial in Criminal Jury Cases.* Moreover, the defendant has not cited any
 11 particularized need that would outweigh the policy of protecting the secrecy of the grand
 12 jury. *United States v. Walczak*, 783 F.2d 852 (9th Cir. 1986) (citing *Pittsburgh Plate
 Glass Co. v. United States*, 360 U.S. 395, 400, 79 S.Ct. 1237, 1241, 3 L.Ed.2d 1323
 13 (1959)) (disclosure of grand jury transcripts would only be appropriate in certain cases
 14 with a particularized showing). In *United States v. Calhela, supra*, just as in this case,
 15 the defendant requested premature disclosure of grand jury transcripts claiming, without
 16 support, that the "it appears that the grand jury was not presented with sufficient
 17 information to enable it to have found probable cause." *United States v. Calhela*, 456 F.
 18 Supp. 350, 364-65 (D. Conn. 2006). In that case, the court denied the request, noting that
 19 the defendant's speculative and conclusory claim did not support a request for an
 20 production or an *in camera* review. *Id.* This court should similarly deny the defendant's
 21 unsupported and unfounded request.

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III. CONCLUSION

For the reasons stated above, the United States should respectfully request that the Court deny the defendant's Motion to Dismiss in all respects.

Respectfully Submitted,

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DATED: July 21, 2008

/s/
DENISE MARIE BARTON
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